Municipal Corporations -- Tort Liability -- Emergency Use of Fire Department Inhalators

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and *S*. The question arises as to whether or not *S's* lien for furnishing materials can defeat *O's* homestead exemption.

The North Carolina Constitution[45] provides that the mechanic's and laborer's liens can defeat the homestead exemption; whereas, the materialman's lien being purely statutory cannot.[46] *C's* lien is a mechanic's lien and by express provision can defeat the homestead. *S's* lien is a materialman's lien and being purely statutory cannot as such defeat the homestead exemption. If *S's* lien is not allowed to defeat the homestead exemption and *C's* lien is, *S* has lost his only security. This would seem contrary to the established policy of protecting the rights of the subcontractor as against the principal contractor. If, however, *S's* materialman's lien is substituted to the rights of *C's* mechanic's lien and thus allowed to defeat the homestead exemption, this would be promoting a materialman's lien to the elevated status of a mechanic's lien in law, though not in fact. Though this result may be desirable as protection for the subcontractor, it certainly should not be attained by giving liens purely statutory the power to defeat rights conferred by the Constitution.

A satisfactory solution of these problems under the existing lien law is not apparent.[47] However, in the light of the possible confusion that application of the existing lien law might produce, a constitutional amendment protecting the subcontractor followed by a revision of our lien law would seem desirable.

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[45] N. C. CONST. Art. X, §4.

[46] Cameron v. McDonald, 216 N. C. 712, 6 S. E. 2d 497 (1939); Broyhill v. Gaither, 119 N. C. 443, 26 S. E. 31 (1896); Cumming v. Bloodworth, 87 N. C. 83 (1882).

[47] The subcontractor's lien for materials would likely be held to be inferior to the constitutionally created homestead rights. However, it is submitted that this would not solve the problem.

Municipal Corporations—Tort Liability—Emergency Use of Fire Department Inhalators

Traffic laws frequently exempt from their operation certain vehicles engaged in public service emergencies[1] or give to such vehicles certain rights of way over other vehicles on the streets and highways.[2] Such

[1] *E.g.*, N. C. GEN. STAT. §20-145 (Supp. 1951): "The speed limitations set forth . . . shall not apply to vehicles . . . of the police in the chase or apprehension of violators of the law . . . nor to fire department or patrol vehicles when traveling in response to a fire alarm, nor to . . . ambulances when traveling in emergencies, nor to vehicles . . . [of the] Utilities Commission when . . . regulating and checking . . .traffic and speed. . . . This provision shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others."

[2] *E.g.*, N. C. GEN. STAT. §20-156 (b) (1943): "The driver of a vehicle . . . shall yield the right of way to police and fire department vehicles and public and

special privileges do not, however, relieve the operator of such a vehicle from the duty of exercising due care under the circumstances.

The application of such statutory special privileges was involved in a recent New Mexico case.[3] There a city employee, driving a city fire truck in response to an emergency call for an inhalator, collided with plaintiffs' automobile at an intersection. The facts as found by the jury revealed that the plaintiffs, not having heard any warning, entered the intersection slowly in response to a green light and were struck by the fire truck, which, prior to applying its brakes fifty feet away, was being driven fifty miles per hour against a red light. In an action for damages, the court affirmed judgment against both defendant employee and defendant city. The court held that a city fire truck responding to a request for an inhalator was *not* "traveling in response to a fire alarm," nor was it an "ambulance" within the purview of a statute[4] exempting fire trucks and ambulances from speed limits when responding to fire alarms and emergencies respectively. Neither was the fire truck being operated upon "official business" within the meaning of a statute[5] requiring all vehicles to yield the right of way to police and fire department vehicles when being operated "on official business and . . . sounding audible signal." Therefore, the fire truck in responding to an emergency call for an inhalator was not entitled to the special privileges granted by the statutes.

No case has been found in which the North Carolina Supreme Court has applied or interpreted sections 20-145 and 20-156 (b) of the General Statutes.[6] Furthermore, the principal case seems to be the first recorded decision in which a court has applied such statutes to a fire department vehicle responding to an emergency call for an inhalator. But in view of the increasingly extensive use of inhalators by the fire departments of North Carolina,[7] an effort will be made to point out, in the light of related decisions in this and other jurisdictions, the probable alternatives open to the North Carolina courts if and when they are confronted by the situation in the principal case.

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private ambulances when the latter are operated upon official business and . . . sound audible signal. . . . This provision shall not operate to relieve the driver . . . [of aforenamed vehicles] from the duty to drive with due regard for the safety of all persons using the highways, nor shall it protect the driver . . . from the consequence of any arbitrary exercise of such right of way."

[3] Tiedebohl v. Springer, 232 P. 2d 694 (N. M. 1951).

[4] N. M. STAT. ANN. §68-509 (1941). This statute is identical with the North Carolina statute (see note 1 *supra*) with the exception that no mention is made of ambulances or utilities commission vehicles.

[5] N. M. STAT. ANN. §68-519 (1941). This statute is identical with the corresponding North Carolina statute. See note 2 *supra*.

[6] See notes 1 and 2 *supra*.

[7] Eight out of ten fire departments interrogated are equipped with inhalators which are available in emergency instances. The fire departments interrogated are located in cities with a population of five to ten thousand.

One court has described statutes strikingly similar to those of North Carolina as "the power of the Legislature to determine what is or is not negligence under the circumstances."[8] In applying such statutes, the courts of California and Maryland have held, in effect, that the operator of an emergency vehicle is not required to use the same care that the law requires of the ordinary motorist.[9] As for the civil liability of the employee driver, it is probable that the North Carolina Court would, in the light of its connective decisions,[10] hold him personally liable to one injured by his negligent operation of the fire truck; however, in the language of our statutes, there must be shown "an arbitrary exercise of the right of way" and "a reckless disregard for the safety of others."[11] Furthermore, in North Carolina, in order to make a traffic violation the basis of a recovery for damages, the act complained of, though negligence per se, must have been the proximate cause of the injury.[12]

Apparently, the court in the principal case grounded the liability of the city on a statute,[13] but an attempt to impose a civil liability upon a municipality in North Carolina under the circumstances of the principal case would inevitably involve the issue of *municipal tort immunity in governmental functions*.[14] North Carolina is in accord with the weight of authority in holding that the maintenance and operation of a fire department is a *governmental* function, and that the municipality, in the

[8] Lucus v. City of Los Angeles, 10 Cal. 2d 476, 60 P. 2d 1011 (1936); *rehearing denied*, 75 P. 2d 599, 601 (1938).

[9] Isaacs v. City and County of San Francisco, 73 Cal. App. 2d 621, 167 P. 2d 221 (1946) ("due regard" means that a driver should, by suitable warning, give others a reasonable opportunity to yield right of way); Raynor v. City of Arcata, 11 Cal. 2d 113, 77 P. 2d 1054 (1938) ("arbitrary exercise" cannot be predicated upon speed and failure to observe other rules of the road where warning has been given); Baltimore Transit Co. v. Young, 189 Md. 428, 56 A. 2d 140 (1947) (ordinary care cannot be expected of one who is attempting to prevent public disaster).

[10] Lewis v. Hunter, 212 N. C. 504, 193 S. E. 814 (1937) (municipal employee engaged in a governmental function held personally liable); Nissen v. City of Winston-Salem, 206 N. C. 888, 175 S. E. 310 (1934) (municipal fireman held to be an employee). See Note, 23 N. C. L. REV. 270 (1945).

[11] See notes 1 and 2 *supra*.

[12] Wallace v. Longest, 226 N. C. 161, 37 S. E. 2d 112 (1946); Hobbs v. Coach Co., 225 N. C. 323, 34 S. E. 2d 211 (1945); Morgan v. Carolina Coach Co., 225 N. C. 668, 36 S. E. 2d 263 (1945); Tarrant v. Bottling Co., 221 N. C. 390, 20 S. E. 2d 565 (1942). In each of these cases the violation of traffic regulations was involved, and in each case the court held that, although the violation of the statute involved was negligence per se, such negligence was actionable only if it was the proximate cause of plaintiff's injuries.

[13] N. M. STAT. ANN. §14-1611 (1941) provides that a municipal corporation shall be liable for any act or tort done by any member or officer of the municipal corporation, when done by the authority of or in the execution of orders of the municipal corporation.

[14] The liability of a municipality in tort depends upon whether the act complained of is characterized as *governmental* or *proprietary*. If governmental, there is no liability unless imposed by statute; if proprietary, the municipality may be held liable. Miller v. Wilson, 222 N. C. 340, 23 S. E. 2d 42 (1942); Parks v. Princetown, 217 N. C. 361, 8 S. E. 2d 217 (1940); Hodges v. Charlotte, 214 N. C. 737, 200 S. E. 889 (1938).

absence of statutes to the contrary, is, therefore, not liable for injury caused by the negligent operation of its fire department vehicles.[15] The courts of some jurisdictions have limited the rule of governmental immunity to the actual going to and returning from a fire, holding the municipality liable when the fire trucks are being used for other purposes.[16] Other jurisdictions, on the other hand, have been more liberal in spreading the cloak of "tort immunity" with regard to the operation of fire vehicles.[17] Although it seems that the principal case is in full accord with the strict view in defining a "governmental function," in the light of *Lewis v. Hunter*[18] it seems probable that North Carolina would give a broader construction to the term, "governmental function." In *Lewis v. Hunter* the court refused to hold a municipality liable for injuries negligently inflicted by a city mechanic while operating a police car for the purpose of testing the radio. The court held that such was a governmental function.[19] Surely, with this case as a precedent, the court might readily hold that the transportation of an inhalator in response to an emergency call is a governmental function, and that the municipality is, therefore, not liable for the negligent operation of the fire trucks by its employee.

Nevertheless, in responding to emergency calls for inhalators, North Carolina municipalities should be cognizant of the fact that the extent of the statutory "exemptions" and "prior rights" applicable to fire department vehicles is, as interpreted in other jurisdictions, necessarily determined by the terms of the grant.[20] North Carolina statutes exempt

[15] Klussette v. Liggett Drug Co., 227 N. C. 353, 42 S. E. 2d 411 (1947); Mabe v. City of Winston-Salem, 190 N. C. 486, 130 S. E. 2d 169 (1925).

For the weight of authority see Notes, 9 A. L. R. 143 (1920), 33 A. L. R. 690 (1924), 110 A. L. R. 1119 (1937) (cases collected on fire department as pertaining to the governmental or proprietary branch of a municipality).

[16] Opocensky v. South Omaha, 101 Neb. 336, 163 N. W. 325 (1917) (court held city liable on the ground that testing a fire truck was not a governmental function); Johnson v. Omaha, 108 Neb. 841, 188 N. W. 122 (1922) (court held city liable on the grounds that driving fire truck from repair shop to station was not a governmental function); Blagay v. Chicago, 290 Ill. App. 598, 7 N. E. 2d 934 (1937) (court held city liable on the ground that hauling rocks into fire station garden with fire truck was not a governmental function).

[17] District of Columbia v. May, 68 F. 2d 755 (D. C. Cir. 1933), *cert. denied*, 292 U. S. 630 (1933) (court held city not liable on ground that driving fire vehicle to get equipment for fire box was a governmental function); Hooper v. Childress, 34 S. W. 2d 907 (Tex. Civ. App. 1931) (negligently driving a truck on routine drive and not in response to a fire call held a governmental function); Rollow v. Ogden City, 66 Utah 475, 243 Pac. 791 (1926) (court held city not liable on grounds that driving fire truck from substation to main station was a governmental function).

[18] 212 N. C. 504, 193 S. E. 814 (1937).

[19] *Id.* at 509, ". . . anything that he did for the city with the automobile in the scope of his employment was done as an incident to the police power of the city—a purely governmental function."

[20] Schumacker v. City of Milwaukee, 209 Wis. 43, 243 N. W. 756 (1932) (". . . if such grant is general and unrestrictive, such vehicles are entitled to assert their privileges at all times when in use for proper purposes); Audette v.

fire trucks from speed limits when "traveling in response to a fire alarm" and give them the right of way when "operated upon official business." *Query:* is the scope of these statutes broad enough to cover fire vehicles responding to emergency calls for inhalators?

In the light of the foregoing comments it would appear that the following possibilities would confront the North Carolina courts in determining the liability of a municipality for injuries negligently inflicted by a fire truck while responding to a call for an inhalator:

(1) A fire vehicle engaged in this function comes within the purview of G. S. 20-145 or G. S. 20-156(b),[21] and (a) such an engagement is a governmental function, thereby not subjecting the municipality to tort liability, unless (b) the municipality is insured against such liability in accordance with North Carolina statutes.[22]

(2) A fire vehicle engaged in this function comes within the purview of G. S. 20-145 or G. S. 20-156(b), but (a) such a function is *not* governmental,[23] and (b) the municipality is liable for all injuries proximately resulting from the negligence of the employee,[24] notwithstanding the question of liability insurance.

(3) A fire vehicle engaged in this function does not come within the purview of G. S. 20-145 or G. S. 20-156(b), and (a) such a function is not governmental, and (b) the municipality is liable for all injuries proximately resulting from the negligence of the employee, notwithstanding the question of liability insurance.

Entirely apart from the issue of municipal liability, the stocking of inhalators as a part of the emergency equipment of fire departments is a development which should be recognized by courts as distinctly in the

New England Transp. Co., 71 R. I. 420, 46 A2d 570 (1946) (". . . when the grant is limited in terms, it must be so construed.").

[21] It seems clear that a fire department vehicle delivering an inhalator is not "traveling in response to a fire alarm" under G. S. 20-145. Neither does it seem correct to designate such a vehicle an "ambulance" under G. S. 20-145. It would seem correct to say that a fire department vehicle delivering an inhalator is "operated upon official business," under G. S. 20-156(b).

[22] N. C. GEN. STAT. §§160-191.1 through 160-191.5 (Supp. 1951). These statutes, enacted by the 1951 Legislature, provide that a municipality may, by properly insuring itself, waive its immunity from tort liability for the negligent operation of its motor vehicles in governmental functions. Such waiver would be effective only to the extent of the liability insurance in force. See Note, 29 N. C. L. REV. 421 (1951).

[23] See note 21 *supra*. Would not "official business" cover both *governmental* and *proprietary* functions? If so, it could be reasoned that the special exemption of G. S. 20-156(b) would apply even though the function is proprietary rather than governmental.

[24] And under G. S. 20-156(b) it would be necessary to find an "arbitrary exercise of . . . right of way" in order to recover from either the individual or the municipality.

public interest. That there may also be a corresponding public interest, perhaps even greater, in holding a municipality liable for the negligence of its employees is merely to emphasize some of the undesirable consequences of the traditional "municipal tort immunity idea." There is good argument for the complete abolition of the "municipal tort immunity rule" so that a municipality would be *subject to* liability just as any private employer.[25] Abolition of this rule in North Carolina would not subject a municipality to liability for the negligent operation of its public service vehicles without regard to the emergency circumstances, as there would still remain the ordinary application of statutory privileges to ascertain what standard of care a municipal employee is to be held to in a given situation.

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Taxation—Gifts in Trust for Minors—Annual Exclusions

Section 1003 (b) (3) of the Internal Revenue Code provides that "In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1943 and subsequent calendar years, the first $3,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year."[1]

In determining what is a future interest within the meaning of section 1003 (b) (3), primary emphasis is placed upon the "use, possession and enjoyment" of the property rather than upon the vesting of the property in the donee.[2] The Regulations[3] stipulate that " 'Future interests' is a legal term, and includes reversions, remainders, and other interests or estates whether vested or contingent, and whether or not

[25] Municipal tort immunity is an old subject of sharp attack. Green, *Municipal Liability for Tort*, 38 ILL. L. REV. 126 (1944); Hobbs, *The Tort Liability of Municipalities*, 27 VA. L. REV. 126 (1940); Warp, *Can the "King" Do No Wrong?*, 31 NAT. MUNIC. REV. 311 (1942); Notes, 14 N. C. L. REV. 388 (1936), 22 N. Y. U. L. Q. REV. 509 (1947), 24 VA. L. REV. 86 (1937).

At least eight states (Cal., Ill., N. M., N. Y., Pa., S. C., W. Va., Wis.) impose, by statute, civil liability upon municipalities for the negligent operation of their motor vehicles in governmental functions.

Florida imposes liability on the municipality on the ground that reckless operation of its vehicles upon the streets constitutes a nuisance.

[1] INT. REV. CODE §1003 (a) provides "The term 'net gifts' means the total amount of gifts made during the calendar year, less the deductions provided in section 1004."

[2] Fondren v. Commissioner, 324 U. S. 18 (1945); United States v. Pelzer, 312 U. S. 399 (1941); Commissioner v. Glos, 123 F. 2d 548 (7th Cir. 1941).

[3] U. S. Treas. Reg. 108, §86.11. This regulation further provides that "The term has no reference to such contractual rights as exist in a bond, note (though bearing no interest until maturity), or in a policy of life insurance, the obligations of which are to be discharged by payments in the future. But a future interest or interests in such contractual obligations may be created by the limitations contained in a trust or other instrument of transfer employed in effecting the gift."